88-1470

Supreme Court, U.S.
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NO.:

UNITED STATES SUPREME COURT

1988 - 1989 Term

LOUIS THEODORE FRIGARD and)
MIRIAM CLAUDIA FRIGARD,)
)
Petitioners,)
)
vs.)
)
UNITED STATES OF AMERICA,)
THE CENTRAL INTELLIGENCE AGENCY,)
a U.S. Governmental Agency,)
)
Respondents.)
)

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNTIED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LOUIS THEODORE FRIGARD; MIRIAM CLAUDIA FRIGARD, *Plaintiffs-Appellants,* v. UNITED STATES OF AMERICA; CENTRAL INTELLIGENCE AGENCY, *Defendants-Appellees.*	No. 87-1906 D.C. No. CV-84-0419-HMF ORDER AND OPINION

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, District Judge, Presiding

Argued and Submitted
June 16, 1988—San Francisco, California

Memorandum Filed August 15, 1988
Opinion Filed November 29, 1988

Before: Ruggero J. Aldisert,* Robert R. Beezer and Diarmuid F. O'Scannlain, Circuit Judges.

Per Curiam

*The Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

SUMMARY

Governmental Torts

Affirming a judgment dismissing a complaint against the CIA, the court held that 28 U.S.C. §§ 2680(a) and (h) precludes CIA liability for loss of a citizen's money.

Appellants Louis and Miriam Frigard sued the United States because they believed that the CIA had misrepresented its participation in a company with which they had invested funds, causing them to lose their investment.

[1] The FTCA's misrepresentation exception bars damage claims arising out of misrepresentation, deceit, or interference with contract rights. Courts have interpreted this exception to bar claims arising from commercial decisions based on false or inadequate information provided by the government. **[2]** All of the Frigards' claims fall within this exception. **[3]** Two factors are considered in applying the discretionary function exception. **[4]** Because the CIA is charged by Congress with collecting intelligence, and because this charge involves elements of judgment and choice and strong public policy considerations, the decision as to how best to fulfill this duty is within its discretion. **[5]** Second, because the alleged decisions by the CIA to use the company and to keep its use of the company secret are administrative decisions grounded in social and economic policy, the decisions are within the CIA's discretion.

COUNSEL

Michael P. Guta and John E. Hill, Hill, Schwartz, Stenson, San Francisco, California, for the plaintiffs-appellants.

Roger D. Einerson and Paul F. Figley, Department of Justice, Washington, D.C., for the defendants-appellees.

ORDER

The Memorandum disposition filed herein is redesignated a Per Curiam Opinion.

OPINION

PER CURIAM:

Louis and Miriam Frigard sued the United States because they believed that the CIA had misrepresented its participation in a company with which they had invested funds, causing them to lose their investment. The district court dismissed the complaint with prejudice for lack of subject matter jurisdiction. We affirm.

FACTS

The Frigards invested funds with Bishop, Baldwin, Rewald, Dillingham & Wong ("BBRDW"), an investment company. Because BBRDW mismanaged their investments, the Frigards lost about $310,000.

The Frigards filed this suit seeking damages against the United States and the Central Intelligence Agency ("CIA") under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) and 2671. The gravamen of their complaint alleged that the CIA used BBRDW as a cover for its operations; wrongfully permitted Rewald, the firm president, to defraud investors; and misrepresented that BBRDW was a legitimate company.

The district court dismissed the Frigards' complaint with prejudice because, *inter alia*:

(1) the claims based on misrepresentation and deceit were barred by the misrepresentation exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(h), and

(2) the entire suit was barred by the discretionary function exception, 28 U.S.C. § 2680(a).

The Frigards timely appeal these findings.[1]

DISCUSSION

1. *The Misrepresentation Exception*

The Federal Tort Claims Act ("FTCA") waives sovereign immunity from suits for damages against the United States

> for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant . . . .

28 U.S.C. § 1346(b).

[1] However, several classes of tort claims are excepted from the FTCA's broad waiver. *United States v. Varig Airlines*, 467 U.S. 797, 808 (1984). Among these is the "misrepresentation exception", which bars damage claims "arising out of . . . misrepresentation, deceit, or interference with contract rights[.]" 28 U.S.C. § 2680(h). Courts have interpreted this exception to bar claims arising from commercial decisions based on false or inadequate information provided by the government. *Guild v. United States*, 685 F.2d

[1]The Frigards also appeal the district court's refusal to consider an improperly filed amendment to the complaint deleting contract claims and claims against the CIA *eo nomine*. Because a local district court has broad discretion in interpreting and applying its own local rules, *United States v. Warren*, 601 F.2d 471, 474 (9th Cir. 1979), and because the proposed amendment did not overcome the jurisdictional defects we find here, the district court did not abuse its discretion. *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

324, 325 (9th Cir. 1982); *see also Alexander v. United States*, 787 F.2d 1349, 1351 (9th Cir. 1986). The misrepresentation exception is broadly construed. *See United States v. Neustadt*, 366 U.S. 696, 702 (1961); *Alexander*, 787 F.2d at 1351.

[2] Here, the Frigards' allegations include claims of the government's breach of a duty to warn investors of its involvement in BBRDW's operations and on the Frigards' reliance on these implied misrepresentations. Because all of these claims are for "damages from commercial decisions based upon false or inadequate information provided by government," *Guild*, 685 F.2d at 325, the district court correctly ruled that the misrepresentation exception barred the claims.

The Frigards could reframe their claims to exclude the misinformation and reliance elements, and thereby avoid the bar of the misrepresentation exception. *See Block v. Neal*, 460 U.S. 289, 297-98 (1983). However, we would also lack jurisdiction to hear such an action for simple mismanagement or negligent supervision under another exception to the Federal Tort Claims Act.

2. *The Discretionary Function Exception*

The FTCA balances Congress' willingness to impose tort liability on the United States against its desire to protect the validity of legislation and discretionary administrative policy and action from testing by damage suits in tort by private individuals. If judicial review interferes with this kind of decisionmaking, then the discretionary function exception applies, and the courts lack jurisdiction. *See generally Dalehite v. United States*, 346 U.S. 15, 26-30 (1953); *Berkovitz v. United States*, No. 87-498, slip op. at 4-6 (U.S. June 13, 1988).

[3] We consider two factors in applying this exception: the nature of the questioned conduct, and its relation to the policy decision generating it. *Varig*, 467 U.S. at 813-14.

A. *Nature of the Conduct*

"[T]he basic inquiry . . . is whether the challenged acts of a Government employee . . . are of the nature and quality that Congress intended to shield from tort liability." *Id.* at 813.

[4] Here, the nature of the conduct at issue — the CIA's alleged use of BBRDW in its covert operations — requires us to apply the discretionary function exception. Because the CIA is charged by Congress with collecting intelligence, and because this charge involves elements of judgment and choice and strong public policy considerations, the decision as to how best to fulfill this duty is within its discretion. The court's review of the decision to use BBRDW would encroach upon the CIA's decisionmaking process; the exception therefore applies. *Id*; *accord Berkovitz*, slip op. at 7-8; *ARA Leisure Serv. v. United States*, 831 F.2d 193, 194 (9th Cir. 1987). *See also Central Intelligence Agency v. Sims*, 471 U.S. 159, 169-170 (1985)(Court evinces special solicitude for independence and secrecy of CIA).

B. *Social, economic, or political decision.*

The discretionary function exception should be applied to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy. *Varig*, 467 U.S. at 814; *Henderson v. United States*, 846 F.2d 1233, 1234 (9th Cir. 1988).

In a recent case much like this one, the Eighth Circuit barred an action against the government brought by an insurer who reimbursed the owners of cars stolen by a ring infiltrated by undercover agents. *Georgia Cas. and Sur. Co. v. United States*, 823 F.2d 260 (8th Cir. 1987). Because the FBI's decision to maintain secrecy involved balancing policy considerations, and because the harm resulted directly from the policy, the decision was immunized by the discretionary function exception. "[T]he means chosen by the Government

to enforce the law are protected." *Id.* at 263; *see also Redmond v. United States*, 518 F.2d 811, 816-17 (7th Cir. 1975) (United States not liable to third party for use of a con man to recover stolen Treasury bond).

[5] Here, similarly, the alleged decisions by the CIA to use BBRDW and to keep its use of the company secret are administrative decisions grounded in social and economic policy. Thus, the decisions are within the discretion of the CIA and protected; by the terms of the statute, this protection continues even if the CIA abused its discretion. *Dalehite*, 346 U.S. at 33.

3. *The Dismissal With Prejudice*

Ordinarily, a case dismissed for lack of subject matter jurisdiction should be dismissed without prejudice so that a plaintiff may reassert his claims in a competent court. *Black v. Payne*, 591 F.2d 83, 86 (9th Cir.), *cert. denied*, 444 U.S. 867 (1979). Here, however, the bar of sovereign immunity is absolute: no other court has the power to hear the case, nor can the Frigards redraft their claims to avoid the exceptions to the FTCA. Thus, the district court did not abuse its discretion in dismissing the action with prejudice.

AFFIRMED.

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

LOUIS THEODORE FRIGARD and MIRIAM CLAUDIA FRIGARD,	)	
Plaintiffs,	)	Civil Action No. 84-0419
vs.	)	
THE UNITED STATES OF AMERICA, CENTRAL INTELLIGENCE AGENCY (CIA), A UNITED STATES GOVERNMENTAL AGENCY,	)	
Defendants.	)	

ORDER

On April 27, 1984, plaintiff Louis and Miriam Frigard filed this action against the United States and the Central Intelligence Agency (CIA) under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§1346(b) and 2671, et seq., seeking $3,000,000 in damages for the alleged wrongful conduct of employees, agents and operatives of the CIA in permitting legitimate investors in the investment firm of Bishop, Baldwin, Rewald, Dillingham and Wong (BBRDW) to be defrauded by Ronald Rewald (Rewald).[1]

[1] The action was stayed from November 9, 1984, until May 20, 1986, pending the outcome of the criminal proceedings against Ronald Rewald. The Complaint states that the allegations are based upon an affidavit by Ronald Rewald and reports in the media. Ronald Rewald was convicted on multiple counts of perjury regarding his affidavit. While this fact has no bearing on the present ruling it should be noted that I am accepting the facts stated in the complaint as being true. However, the fact that Rewald was convicted of perjury on these allegations may affect counsel's obligations with respect to any attempt to amend the Complaint. Rule 11, Federal Rules of Civil Procedure.

On July 23, 1986, defendants, United States of America and the Central Intelligence Agency, filed a motion to dismiss the Complaint.[2] Defendants' motion is based upon the grounds that plaintiffs' claims are barred by the misrepresentation and discretionary function exceptions to the government's waiver of sovereign immunity under the Federal Tort Claims Act. 28 U.S.C. §§2680(a) and (h). Defendants also argue that this Court lacks jurisdiction over plaintiffs' contract claims and over defendant Central Intelligence Agency, eo nomine.

For reasons set forth below, the Court grants defendants' motion to dismiss on all grounds and dismisses plaintiffs' Complaint with prejudice.[3]

I.

Plaintiffs allege that Ronald Rewald was a covert agent of the CIA who set up BBRDW "to shelter monies of highly placed foreigners and the CIA's own use." Plaintiff further alleged that the CIA "knew the manner in which [BBRDW] raised and obtained funds from legitimate investors and knew what

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[2] Plaintiffs failed to respond to defendants' motion within the period mandated by Local Rule 220.3. Moreover, they did not seek an extension of time in which to reply. Three days before the September 29, 1986, hearing on defendants' motion and more than two weeks after their response was due under Local Rule 220.3, plaintiffs filed a brief in opposition to the motion to dismiss. The brief also purported to be in support of a motion to amend the complaint. (A proposed amended complaint was attached to the brief.) However, the docket sheet reflects, and plaintiffs concede, that a motion to amend the complaint was not filed prior to the hearing, or subsequently. At the hearing on defendants' motion to dismiss, the Court granted defendants' oral motion to strike plaintiffs' untimely response and the proposed amended complaint.

[3] Plaintiffs conceded at the hearing on defendants' motion to dismiss that this Court lacks jurisdiction over the contract claims because they exceed $10,000 (see 28 U.S.C. §§1491(a)(1) and 1346(a)(2)) and over the Central Intelligence Agency, eo nomine. Accordingly, plaintiffs' complaint is dismissed with prejudice against the CIA as a party defendant and with respect to all claims that sound in contract.

representations were made by [BBRDW] to legitimate investors to induce them to invest their funds." Plaintiffs also allege that the CIA knew that "its funds were co-mingled with the funds of [BBRDW] and its clients." Moreover, plaintiffs allege that the "CIA acted in a manner which was grossly negligent in that the CIA neither supervised nor cared about the aforementioned investors which the CIA trapped into bogus investments, and not only mulched [sic] the plaintiffs and other investors, but brought disrespect and dishonor on the United States Government and on one of its agencies." Plaintiffs also allege that defendants negligently entrusted "the management, operation, control, supervision, and counseling, of BBRDW to individuals who defendant knew, or in the exercise of reasonable care, should have known, were unfit and unqualified, and otherwise incapable of such task under the circumstances as hereinabove described.

Plaintiffs further allege that defendants "made certain misrepresentations to plaintiffs that plaintiffs would receive a substantial return on their investments with BBRDW, and that the investment firm of BBRDW was a legitimate, reputable, qualified investment firm." However, plaintiffs contend that the defendants knew or should have known that "BBRDW was not a legitimate investment firm, but rather was a covert operation run by the CIA" as a "college [sic] of art and deception and as a counterpart for this sordid espionage system that all of today's world governments have degenerated into." Plaintiffs claim that the CIA must be stopped or it will continue to "inveigle other blameless world investors into such schemes."[4]

Finally, plaintiffs allege that as a part of these "misrepresentations" the CIA instructed and encouraged Rewald to live an opulent lifestyle to deceive plaintiffs and others into "think[ing] that BBRDW was an honest, innocuous, straightforward, American, commercial business company," whereas "in fact, BBRDW was a dirty, deceptive, duplicitous

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[4] Black's Law Dictionary defines inveigle as "to lure or entice or lead astray by false representations or promises, or other deceitful means."

front for a malevolent espionage agency." To carry out its duplicitous scheme, plaintiffs allege that the "CIA, with malice aforethought and duplicitous [sic] intent has deceived and lied to the press and communication public services all over the world saying that Rewald was not their secret, CIA agent, and secondly, saying they knew nothing of BBRDW, when the truth in fact is that the defendant, CIA, now admits that said Rewald was their secret, covert, espionage agent with wide authority all over the world." According to plaintiffs, the CIA not only made these misrepresentations negligently but also "deliberately lied to the plaintiff as to its connection and activities with said Rewald."

II.

It is well established that the United States, as sovereign, is immune from suit in tort unless it has consented to waive that immunity. In doing so, the United States is permitted to define the conditions upon which such actions may be brought. United States v. Sherwood, 312 U.S. 584 (1940). Absent such consent, suit is barred by the doctrine of sovereign immunity. The waiver of sovereign immunity must be unequivocally expressed. United States v. Testan, 424 U.S. 392 (1976).

The Federal Tort Claims Act constitutes a limited waiver of the United States' immunity from suits in tort. Section 1346(b) authorizes suits against the United States for damages

> for injury or loss of property, or for personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The FTCA also provides that the United States shall be liable with respect to tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. §2674.

The FTCA does not, however, waive the cloak of sovereign immunity in all respects. Congress excepted several important classes of tort claims from the Act's broad waiver of sovereign immunity. United States v. Varig Airlines, 467 U.S. 797, 808 (1984). If a claim falls within one of the exceptions (28 U.S.C. §2680(a)-(n)), the district court lacks subject matter jurisdiction and the case must be dismissed on that basis. Jablonski By Pahls v. United States, 712 F.2d 391, 395 (9th Cir. 1983).

In the present case, plaintiffs' claims are barred by the misrepresentation exception and the discretionary function exception.

A.

Plaintiffs' complaint essentially alleges that the United States negligently or intentionally misrepresented certain facts to them and was negligent in failing to inform or warn investors in BBRDW that they were being defrauded by Ronald Rewald. Such claims are barred by the misrepresentation exception to the Federal Tort Claims Act. 28 U.S.C. §2680(h).

Section 2680(h) deprives district courts of jurisdiction over tort claims "arising out of" misrepresentation and deceit. Federal law defines the scope of the misrepresentation exception. United States v. Neustadt, 366 U.S. 696, 705-706 (1961).

The misrepresentation exception has been interpreted to bar "claims arising out of negligent, as well as willful, misrepresentation." United States v. Neustadt, 366 U.S. 696, 702, 704 (1961). Accord, Clark v. United States, 218 F.2d 446, 452 (9th Cir. 1954); First S. & L. Ass'n v. First Fed. S & L. Ass'n, 531 F. Supp. 251, 255 n.9 (D. Hawaii 1981). It also bars claims "arising out of" affirmative misstatements and negligent omissions. Green v. United States, 629 F.2d 581, 584 (9th Cir, 1980).

All claims of fraud of any type are excluded from the operation of the FTCA, including "both fraud in the factum as well as in inducement, both actual and constructive fraud,

intrinsic and extrinsic fraud and other species of deceit or false representation." Coverington v. United States Department of Air Force, 303 F. Supp. 1145 (N.D. Miss. 1969).

The Ninth Circuit has construed Section 2680(h) "to except from the Act cases where mere 'talk' or failure to 'talk' on the part of a government employee is asserted as a proximate cause of the damages sought to be recovered from the United States." City and County of San Francisco v. United States, 615 F.2d 498, 505 (9th Cir. 1980), quoting from National Mfg. Co. v. United States, 210 F.2d 263, 275 (8th Cir.), cert. denied, 347 U.S. 967 (1954). "To misrepresent means to 'give a false, improper, or imperfect representation.'" National Manufacturing Co., 210 F.2d at 276.

The Ninth Circuit also construed the misrepresentation exception to preclude "liability where the plaintiff suffers economic loss as a result of a commercial decision which was based on a misrepresentation by the government consisting either of false statements or a failure to provide information which it had a duty to provide." Green v. United States, 629 F.2d at 584-585. Accord, Leaf v. United States, 661 F.2d 740, 742 (9th Cir. 1981).

The exception also bars suits based upon the failure to give warnings to injured parties. See, e.g., Green v. United States, 629 F.2d at 584; City and County of San Francisco v. United States, 615 F.2d at 504-505.

The Supreme Court first discussed the misrepresentation exception in United States v. Neustadt, 366 U.S. 696 (1961). In that case, the purchasers of a house that had been appraised by the Federal Housing Administration alleged that FHA had conducted its inspection and appraisal negligently, and that they had paid a price far in excess of the house's fair value due to their reliance on the appraisal. Id. at 700-01. The Court held that Section 2680(h) barred any such claim, regardless of whether FHA was in fact negligent, and regardless of whether FHA owed plaintiffs a "'specific duty' to obtain and communicate

information carefully." Id. at 710-11. In arriving at that conclusion, the Court first held that Congress' inclusion of both "deceit" and "misrepresentation" in Section 2680(h) showed conclusively that the latter term must include negligent, as well as intentional, misrepresentation. Id. at 702-03. The Court went on to indicate that what Congress particularly "had in mind when it placed the word 'misrepresentation' [in] §2680(h)" was the "tort of 'negligent misrepresentation,'" as that tort had been defined at common law. Id. at 706-07. The Court quoted at length from the Restatement of Torts, which defined negligent misrepresentation as involving the supplying of "information for the guidance of others in their business transactions," resulting in "harm caused to them by their reliance upon the information." Id. at 706-07 n.16 (quoting Restatement of Torts §552 (1938)). The Court held that plaintiffs' claim fell squarely within that definition, because their injuries had resulted, according to their own allegations, from their reliance on the FHA's statement. The Court rejected plaintiffs' attempt to avoid the effect of 28 U.S.C. §2680(a) by artful pleading. The Court, in holding that the claim was one "arising out of" misrepresentation, explained that courts are not constrained by the language of the pleading and "must then look beyond the literal meaning of the language to ascertain the real cause of complaint." Id. at 703 (quoting from Hall v. United States, 274 F.2d at 71).

The Court noted that numerous courts, including the Ninth Circuit in Clark v. United States, 218 F.2d 446 (9th Cir. 1954), had rejected the argument that "§2680(h) does not apply when the gist of the claim lies in negligence underlying the inaccurate representation, i.e., when the claim is phrased as one 'arising out of' negligence rather than 'misrepresentation.'" Id. at 703. (Emphasis in original.) The Court stated that such arguments were "nothing more than an attempt to circumvent §2680(h) by denying that it applies to negligent misrepresentation.' Id. at 703.

The court of appeals have held that the "one essential element of misrepresentation remains reliance by the plaintiff himself upon the false information that has been provided."

Jimenez-Nieves v. United States, 682 F.2d 1, 4 (1st Cir. 1982). In Ramirez v. United States, 567 F.2d 854, 856 (9th Cir. 1977) (*en banc*), the Ninth Circuit recognized that Section 2680(h) "protects the United States from liability in those many situations where a private individual relies to his economic detriment on the advice of a governmental official." Thus, where plaintiffs have made commercial decisions based upon such reliance, the Ninth Circuit has consistently upheld the application of the misrepresentation exception. For example, in Leaf v. United States, the Court held that:

> It is clear that misrepresentation is an issue at the heart of plaintiffs' complaint, however, deftly they have attempted to avoid using the word. Bean's admittedly intentional misrepresentations to plaintiffs were clearly within the chain of causative events upon which plaintiffs' claim is founded, and thus within the misrepresentation exception. Redmond v. United States, 518 F.2d 811, 814-816 (7th Cir. 1975). Put another way, misrepresentation was definitely a significant factor relied upon by plaintiffs in maintaining their suit, and the suit is therefore barred by the misrepresentation exception stated in 28 U.S.C. §2680(h). BorSon Bldg. Corp. v. Heller, 572 F.2d 174 (8th Cir. 1978).

Id. at 742.

In Redmond v. United States, 518 F.2d 811 (7th Cir. 1975), cited with approval by the Ninth Circuit in Leaf v. United States, the Seventh Circuit held that the misrepresentation exception barred plaintiff's claim that agents and operatives of the government permitted plaintiff to be defrauded by a "securities dealer" described as a "highly competent confidence man working with government agents to recover a stolen U.S. Treasury bond." Id. at 812. The facts of the Redmond case are strikingly similar to those alleged by plaintiffs in the present case. (See Appendix A, summary of allegations in Redmond). In

Redmond, plaintiff alleged that government employees breached their duty to warn him that he was in imminent danger of becoming the financial victim of a confidence man's criminal propensities. The court examined the allegations in the complaint and found that they

> clearly state a course of events, calculated to mislead Redmond by a series of misstatements of fact, half-truths, and deception; that the Government's agents are alleged to have been involved in the dissemination of the misleading information, and that the complaint clearly alleges that the agents were attempting to represent [the informant] as being something he was not. It is clear to us, as it was to Judge Holder below, that actual facts pleaded make out a case for misrepresentation.

Id. at 814.

The Redmond court specifically rejected plaintiff's attempt to avoid the reach of Section 2680(h) by claiming that the misrepresentations were not the kind barred by Section 2680(h). Plaintiff argued that "[if] there were misrepresentations made by federal officers in this case, they are collateral and incidental to the negligence of these agents in failing to warn the plaintiff of a danger which they knew to exist." Id. at 814. In rejecting plaintiff's contention, the court held that the allegations "were the sine qua non in the chain of causative events on which Redmond's claim is founded." Id. at 814. The court also rejected plaintiff's argument that the government had a duty to warn him of the confidence man's criminal conduct. Id. at 816.[5]

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[5] Accord, e.g., Boda v. United States, 698 F.2d 1174 (11th Cir. 1985) (the failure of the government agents to prevent the witness from defrauding plaintiff was barred by Section 2680(h)); First Savings and Loan Insurance Corporation v. Alexander, 590 F. Supp. 834 (D. Hawaii 1984) (failure of the United States to warn directors of First Savings of the unsavory financial reputation of one Henry Kersting was protected by the misrepresentation exception); First Savings & Loan Association v. First Federal Savings and

In this case, plaintiffs assert that the CIA permitted them to be defrauded by Ronald Rewald and the investment firm of Bishop, Baldwin, Rewald, Dillingham and Wong. Plaintiffs further allege that the CIA knew the manner in which BBRDW raised funds and what representations were made by the firm in raising such funds. Moreover, plaintiffs claim that the CIA defrauded plaintiffs and misrepresented the expected rate of return on certain investments. As such, all of plaintiffs' claims "aris[e] out of" alleged misrepresentations and deceit.

Plaintiffs attempt to avoid the reach of Section 2680(h) by arguing that the CIA negligently failed to supervise Rewald's action and failed to protect investors from Rewald's criminal propensities; that the CIA negligently entrusted the management and operations of BBRDW to unfit and unqualified persons, such as Rewald; and negligently operated BBRDW. Plaintiffs' argument is nothing more than an attempt to avoid Section 2680(h) by phrasing their claim as one "arising out of" negligence rather than misrepresentation. The Supreme Court in Neustadt rejected and identical argument. 366 U.S. at 703. The Neustadt Court held that courts are not constrained by the language of the pleading and "must...look beyond the literal meaning of the language to ascertain the real cause of complaint." Id. at 703. The Ninth Circuit has consistently followed the Supreme Court's admonishment in Neustadt by rejecting attempts to avoid the broad reach of Section 2680(h) by artful pleadings. See, e.g., Alexander v. United States, 787 F.2d 1349, 1350-1351 (9th Cir. 1986) (failure to remove arrest record items from FBI report before sending report to subject's employer); Owyhee Grazing Association v. Field, 637 F.2d 694,

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Loan Association, 531 F. Supp. 251 (D. Hawaii 1981) (claim of conspiracy between FSLIC and others to place First Savings into receivership barred by 28 U.S.C. §2680(h)); Georgia Cas. and Sur. Co., v. United States, 582 F. Supp. 49 (E.D. Mo. 1984) (claims that undercover agents of the FBI conspired and colluded with suspected motor vehicle thieves to steal, alter the identity of and resell motor vehicles and failed to warn third parties were barred by 28 U.S.C. §2680(h)).

697 (9th Cir. 1981) (claims that Farmers Home Adminstration conspired with others to defraud plaintiffs of membership in association); Leaf v. United States, 661 F.2d 740, 742 (9th Cir. 1981); City and County of San Francisco v. United States, 615 F.2d 498, 504-505 (9th Cir. 1980). It is clear that misrepresentation is at the heart of plaintiffs' complaint. Accordingly, plaintiffs' claims are barred by Section 2680(h) and the complaint is dismissed with prejudice.[6]

B.

Plaintiffs' suit is also barred by the "discretionary function or duty" exception to the FTCA. 28 U.S.C. § 2680(a). Section 2680(a) precludes any claim that it "based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government." Section 2680(a) applies "whether or not the discretion involved be abused."

The Supreme Court first discussed the discretionary function exception in Dalehite v. United States, 346 U.S. 15 (1953), a case involving multiple claims arising from the government's allegedly negligent storage and shipping of fertilizer, which had resulted in a major explosion. In reviewing the legislative history of the FTCA, The Court emphasized that while Congress intended to provide a remedy for "ordinary common-law torts," it "was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function." Id. at 28. The Court pointed out that the exception applies, by its terms, even where negligence or abuse of discretion can be clearly established in order to protect "the

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[6] At oral argument, plaintiffs argued that they could prove that the CIA negligently ran BBRDW, thereby avoiding the reach of Section 2680((h). Since plaintiffs had not moved to amend their complaint to raise that cause of action, the issue was not before the Court. It may be that plaintiffs can plead a cause of action for negligence that is separate from and does not arise out of misrepresentation (See footnote 1, supra), but the Court declines to decide that issue in the abstract.

discretion of the administrator to act according to one's best judgment of the best course." Id. at 33-34. The Court held that the discretion is not limited to the broad policy decision of persons in high office. Rather, the discretionary function exception

> includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official discretions cannot be actionable.

346 U.S. at 35-36.

The vitality of these principles is underscored by the Supreme Court's recent decision in United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797 (1984). In reaffirming Dalehite's essential holdings the Court articulated two fundamental principles for the application of the discretionary function exception. First consistent with the passage quoted above from Dalehite, the court pointed out that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case * * *. [T]he exception covers * * * 'all employees exercising discretion.'" Id. at 2765 (quoting Dalehite, 346 U.S. at 33). Second, the Court explained that the "underlying basis" of the exception was Congress' intent "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." Id.

Based on these principles, the Varig Court applied the discretionary function exception broadly to the FAA certification and inspection of aircraft. The Court held that the FAA exercised discretion in adopting a policy of "spot-checking" rather than

exhaustive inspection of each aspect of an aircraft, and also that individual FAA employees exercised discretion in making individual determinations under the program. Although procedures for spot-checking were outlined in detail in FAA manuals, the Court held that those individual determinations nevertheless constituted "policy judgments" deserving of protection under §2680(a). Id.

Since *Varig*, the Ninth Circuit has decided a number of cases involving the discretionary function exception. In Begay v. United States, 768 F.2d 1059 (9th Cir. 1985), the Ninth Circuit applied Varig to alleged government negligence with respect to the exposure of uranium miners to radiation, including claims that Public Health Service employees failed to provide warnings of the dangers known to them. In the course of finding all such claims barred under Varig, the court specifically rejected the argument that Varig applies only to "regulatory decisions by federal agencies." 768 F.2d at 1063-64. The court noted that Varig itself had indicated that its principles apply equally to "'other administrative action not of a regulatory nature, such as the * * * execution of a Federal project * * *.'" Id. (quoting Varig, 104 S.Ct. at 2763). See also, Cunningham v. United States, 786 F.2d 1445 (9th Cir. 1986).

Claims based upon the government's use of informants, operatives, or third persons or upon the government's failure to disclose the identity and nature of its relationship with such persons are barred by the discretionary function exception. In a case strikingly similar to the present case, the Seventh Circuit in Redmond v. United States, 518 F.2d 811 (7th Cir. 1978), held that claims based upon the government's use of a confidence man who used plaintiff as a decoy to recover a stolen U.S. Treasury bond were barred by the discretionary function exception, as were plaintiff's claims based upon the government's failure to warn the plaintiff. The court stated that it "cannot be denied that the Government has a duty to maintain law and order, but how best to fulfill this duty is wholly within the discretion of its officers, and §2680(a) excepts from the Act both discretionary functions and discretionary duties." Id. at 816-

817. Accord, Jet Industries, Inc. v. United States, 777 F.2d 303 (5th Cir. 1985) (the selection and supervision of participants in the federal witness protection program); Ostera v. United States, 769 F.2d 716 (11th Cir. 1985) (the decisions to use an informant with vicious propensities and to obtain his release from incarceration); Flammia v. United States, 739 F.2d 202 (5th Cir. 1984) (supervision of paroled refugee with criminal history); Bergman v. United States, 689 F.2d 789 (8th Cir. 1982) (the selection and supervision of federally protected witness who murdered police officer).

In this case, the plaintiffs allege that the CIA used Rewald and BBRDW for intelligence and counterintelligence operations.[7] Since the Central Intelligence Agency has a duty[8] to collect, produce and disseminate intelligence information, the alleged decisions to set up BBRDW and to use it to further the mission of the CIA are wholly within the discretion of the agency and, even if done negligently, those decisions are protected by the discretionary function exception. Redmond v. United States, 518 F.2d 811 (7th Cir. 1975). Therefore, plaintiffs' claims are dismissed with prejudice because they are barred by 28 U.S.C. §2680(a).

For the foregoing reasons, plaintiffs' Complaint is hereby dismissed with prejudice on all grounds and plaintiffs are hereby ordered to pay defendants' cost.

DATED: JAN 14 1987 HAROLD M. FONG

UNITED STATES DISTRICT COURT

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[7] The Court takes judicial notice that Ronald Rewald was convicted of perjury regarding sworn statements he made accusing the CIA of the very conduct of which plaintiffs complain.

[8] National Security Act of 1947, §102 (50 U.S.C. §403); CIA Act of 1949; and Executive Order 12333.

APPENDIX A

The Redmond complaint contained essentially the following allegations:

A. The Government "negligently fashioned an aura of respectability and conferred credibility and trustworthiness upon the defendant Wuensche" (Complaint, ¶VIII) by:

(1) permitting Wuensche to gain the confidence of Redmond and to be accepted as a respectable business man when the Government knew that Wuensche had served four prison terms for dealing in forged securities (¶VIII(b));

(2) permitting Wuensche to prey upon Redmond when it was known that Wuensche had "worked with top crime syndicate figures" (¶VIII(c));

(3) permitting Wuensche to enlist the services of Redmond to be used as a decoy in the recovery of a stolen U.S. Treasury Bond (¶VIII(d));

(4) conferring trustworthiness upon Wuensche during the recovery of said bond by "representing to plaintiff that Wuensche was a co-worker of the Secret Service, and as such could be trusted" (¶VIII(d));

(5) permitting Wuensche to give an impression that he was an undercover agent for the Government (¶VIII(e));

(6) permitting Wuensche to make unlimited long distance telephone calls at Government expense and to give orders to Government agents and employees, "all of which represented that Wuensche was a trusted public servant, which was false and known by the Government to be false" (¶VIII(f));

(7) permitting Wuensche to furnish the names of two Government officials as personal character references, "which falsely and fraudulently led plaintiff to believe Wuensche was a person of good character, which was false and known by the agents of the government to be false" (¶VIII(q));

(8) representing to Redmond that Wuensche was a Government employee, which representation was false and known to be false (¶VIII(h));

(9) representing to Redmond that Wuensche was a person of substantial means, "which representation was false and known by the government to be false" (¶VIII(i));

B. As a direct and proximate result of the Government's failure to disclose to Redmond the "nefarious criminal activities" of Wuensche, when it is or should be apparent to the Government that such failure would cause harm to Redmond, Redmond was caused to rely upon the integrity of Wuensche. (Complaint, ¶IX);

C. Such failure to disclose on the part of the Government "became a plan to aid and abet Wuensche and others in the scheme to defraud plaintiff." (Complaint, ¶IX);

D. As a result of the foregoing acts or omissions of the Government, Redmond was induced to lose $1,065,000 by purchasing and then pledging worthless securities, and suffered substantial injury by the sudden termination of all lines of credit, by the loss of a $100,000-a-year earning capacity, by embarrassment, mental anguish, and humiliation. (Complaint, ¶X).

APPENDIX C

United States Court of Appeals

For the Ninth Circuit

LOUIS THEDORE FRIGARD; MIRIAM CLAUDIA FRIGARD,	)	
Plaintiffs-Appellants,	)	
vs.	)	No. 87-1906
	)	DC CV 84-0419HMF
THE UNITED STATES OF AMERICA; CENTRAL INTELLIGENCE AGENCY,	)	
Defendants-Appellees	)	

APPEAL from the United States District Court for the District of Hawaii (Honolulu)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered August 15, 1988

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOUIS THEODORE FRIGARD; MIRIAM CLAUDIA FRIGARD, Plaintiffs-Appellants, vs. THE UNITED STATES OF AMERICA; CENTRAL INTELLIGENCE AGENCY Defendants-Appellees	)	No. 87-1906 DC No. CV 84-0419-HMF **ORDER**

Before: ALDISERT, * BEEZER, and O'SCANNLAIN, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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* The Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.